In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1185

FIRESTONE PLASTICS COMPANY, A DIVISION OF THE FIRESTONE TIRE & RUBBER COMPANY, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners, manufacturers of polyvinyl chloride, seek review of the court of appeals' decision upholding the validity of the Secretary of Labor's regulation of vinyl chloride, a potent carcinogen. Petitioners claim that the court below applied an erroneous standard of review, that the regulation is not supported by substantial evidence, and that the standard it contains is not feasible of attainment.

On October 1, 1974, following lengthy hearings, the Secretary of Labor, acting pursuant to the Occupational Safety and Health Act, 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, issued his final standard regulating worker exposure to vinyl

chloride. 39 Fed. Reg. 35890-35898.[1] Basically, the Secretary's standard requires that no worker is to be exposed to concentrations of vinyl chloride in excess of one part per million (1 ppm) of air averaged over any eight-hour period (Pet. App. 4a; 39 Fed. Reg. 35896). This reduction in exposure level is to be achieved through engineering, work practice controls, and respiratory protection for workers. The key provisions of the standard require that (39 Fed. Reg. 35896):

> (1) Feasible engineering and work practice controls shall immediately be used to reduce exposures to at or below the permissible exposure limit.
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> (2) Wherever feasible engineering and work practice controls which can be instituted immediately are not sufficient to reduce exposures to at or below the permissible exposure limit, they shall nonetheless be used to reduce exposures to the lowest practicable level, and shall be supplemented by respiratory protection * * * .

The court of appeals, in an opinion by Mr. Justice Clark (Pet. App. 1a-19a), upheld the Secretary's regulation. After a painstaking examination of the 4,000-page record, the court concluded that "the standard laid down by the Secretary is fully supported by the record * * * " (Pet. App. 6a). The court noted (i) that vinyl chloride was the causative agent in the deaths of 13 workers, (ii) that experimental animals had developed cancers at very low level of exposure (50 ppm), (iii) that no safe level for humans could be identified, and (iv) that a substantial body of

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[1]The Secretary's standard provided that it would become effective on January 1, 1975. The standard was stayed by the Second Circuit pending its consideration of the merits, and became effective on April 1, 1975, after the Second Circuit on February 25, 1975, and this Court on March 31, 1975, denied petitioners' applications for a further stay.

expert opinion recommended that human exposure be set at the lowest detectable level (Pet. App. 13a-15a). Given those facts, the court reasoned that the Secretary, acting under a statutory duty to protect the working man, did not err in choosing to reduce the permissible level of exposure to 1 ppm (Pet. App. 14a-15a).

The court also rejected petitioners' claim that the standard was not "feasible." It noted that the standard requires petitioners' to use engineering controls "to the extent feasible" in their effort to reduce vinyl chloride exposure to the permissible level (Pet. App. 17a). Should their feasible engineering efforts nevertheless fail to reach the 1 ppm level, then the court found that petitioners' can supplement their efforts by affording their workers respiratory protection. Thus, the court ruled that compliance with the standard was not beyond petitioners' reach (Pet. App. 17a-18a).

1. The Second Circuit applied the proper standard of review in holding that the Secretary of Labor's vinyl chloride standard was a permissible response to the carcinogenic hazard of vinyl chloride, fully supported by the record, and within petitioners' reach of accomplishment. In assessing the validity of the Secretary's standard, the Second Circuit applied the same standard of judicial review that the courts of appeals have consistently followed in reviewing the Secretary's occupational safety and health standards: That the Secretary is limited to the rule-making record, that his factual findings must be supported by substantial evidence, and that to the extent he exercises what is more akin to a legislative judgment, that judgment must be reasoned. See *Synthetic Organic Chemical Manufacturers Ass'n* v. *Brennan*, 503 F.2d 1155 (C.A. 3), certiorari denied, March 18, 1975, No. 74-789; *Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F.2d 467 (C.A.D.C.); *Florida Peach Growers Ass'n, Inc.* v. *Brennan*,

489 F.2d 120 (C.A. 5); *National Roofing Contractors Ass'n* v. *Brennan*, 495 F.2d 1294 (C.A. 7); *Associated Industries of New York State, Inc.* v. *U.S. Department of Labor*, 487 F.2d 342 (C.A. 2). In any event, only two months ago this Court deemed the issue raised by petitioners unworthy of review, when it denied the petition for a writ of certiorari in *Synthetic Organic Chemical Manufacturers Ass'n* v. *Brennan, supra*, which, petitioners acknowledge, "rais[ed] * * * the identical issue as to the proper standard of review" (Pet. 18).

2. That the Secretary of Labor chose to set the permissible level of exposure to vinyl chloride at 1 ppm rather than at some higher concentration was well within his discretion. The purpose of the Occupational Safety and Health Act, under which the standard was promulgated, is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651. And Congress has directed the Secretary to promulgate "the standard which most adequately assures, to the extent feasible on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." 29 U.S.C. 655(b)(5). Given the undisputed evidence that vinyl chloride exposure has already caused the deaths of numerous workers, and that a no-effect level for man had not been established, it was within the Secretary's power to limit exposure to 1 ppm. See *Synthetic Organic Chemical Manufacturers Ass'n* v. *Brennan, supra*; *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, C.A.D.C., No. 74-1924, *et al.*, decided April 4, 1975; *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 489 F.2d 1247 (C.A.D.C.).

3. The Second Circuit also correctly ruled "that the Secretary's directions are clear, definite, and certain and that they are also entirely feasible, since the goal of the lowest detectable level can definitely be attained through the combination of technological means and respirators" (Pet. App. 18a). The standard's principal requirement, that petitioners' workers are not to be exposed to concentrations of vinyl chloride in excess of 1 ppm, is stated in terms of an objective criterion which is clear and definite. It does not cast an impossible burden on petitioners. With regard to the engineering effort mandated, the standard, by its terms, only requires "feasible engineering," and that can properly be imposed. *International Harvester Company* v. *Ruckelshaus*, 478 F.2d 615, 623 (C.A.D.C.); *Industrial Union Dept., AFL-CIO* v. *Hodgson*, 499 F.2d 467 (C.A. D.C.).[2] Where feasible engineering does not suffice to meet the 1-ppm requirement, then, as the Second Circuit correctly found, respirators are available which are capable of filtering out the excessive vinyl chloride.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[2]Petitioners are mistaken in asserting a conflict between the decision below and *Industrial Union Department, AFL-CIO* v. *Hodgson, supra*. That decision does not stand for the proposition that the Secretary of Labor is restricted to promulgating standards which can be met simply with existing technology, but rather that in imposing technology-forcing standards, the standards must be of such a nature as not to make financial viability generally impossible. 499 F.2d at 478. Here, the industry-commissioned consultant was not even asked whether the standard would in fact put even one company out of business, let alone make financial viability generally impossible. Supplemental Appendix before the Second Circuit, pp. 131, 135-136.